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**G4S Government Solutions, Inc., d/b/a WSI Savannah River Site, a/k/a WSI-SRS and International Guards Union of America, Petitioner. Case 10-RC-126849**

February 10, 2016

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On July 7, 2014, the Board granted in part the Employer's Request for Review of the Regional Director's Decision and Direction of Election as it raised a substantial issue with respect to whether the Employer's lieutenants are supervisors within the meaning of Section 2(11) of the Act based on their asserted authority to assign, responsibly direct, and discipline.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the entire record with respect to the issues on review, including the briefs on review, we affirm the Regional Director's finding that the Employer did not meet its burden of establishing that its lieutenants are supervisors.<sup>1</sup>

The sole question the Board must answer in this case, as in all cases involving supervisory determinations, is whether the party asserting supervisory status has met its burden of proving that the person at issue possesses one or more of the indicia set forth in Section 2(11). To establish that the lieutenants at issue in this case are supervisors, the Employer must show that: (1) the lieutenants hold the authority to engage in any one of the statutory supervisory functions, (2) their exercise of such authority is not routine or clerical, but requires the use of independent judgment, and (3) their authority is held in the interest of the Employer. See *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). At issue in this case are the functions of assignment, responsible direction, and discipline.

<sup>1</sup> In affirming the Regional Director's findings, we do not rely on his citations to *G4S Regulated Security Solutions*, 358 NLRB 1701 (2012), and *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43, slip op. at 6 (2012). Instead, we rely on *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 2, 3 (2015), incorporating by reference 358 NLRB 1701, and *Brusco Tug & Barge, Inc.*, 362 NLRB No. 28 (2015), incorporating by reference 359 NLRB No. 43. We also do not rely on *Alternate Concepts, Inc.*, 358 NLRB 292 (2012), cited by the Regional Director for the proposition that conclusory statements are insufficient to establish supervisory status. Instead, we rely on *Lynwood Manor*, 350 NLRB 489, 490 (2007). We also correct the issuance date of *DirectTV*, 357 NLRB 1747, cited by the Regional Director. That case issued in 2011, rather than 2012.

pline. The dissent finds that the Employer has met its burden of showing that the lieutenants possess the authority to responsibly direct employees using independent judgment within the meaning of the Act. We disagree. We find, for the reasons set forth by the Regional Director and those set forth below, that the Employer has not met its burden with respect to any of the statutory supervisory functions.

**Responsible Direction**

For direction to be "responsible," under the Act, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691–692. To establish responsible direction, the Employer must show that the lieutenants are held accountable for the performance and work of the employees they direct. It is not enough to show that the lieutenants are accountable for their own mistakes. *Id.* at 695; see *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154–2155 (2011), *enfd.* in relevant part \_\_\_ F.3d \_\_\_, 2015 WL 8228998 (5th Cir. Dec. 7, 2015) ("Every circuit court that has interpreted *Oakwood* has read it to require responsibility for others' actions." (citations omitted)).

We find that the record does not establish that the lieutenants are held personally accountable for the performance of their subordinates as required to establish responsible direction under *Oakwood Healthcare*, 348 NLRB at 691–692. There is only one example purportedly establishing that lieutenants are "accountable" for the performance of their subordinates.<sup>2</sup> As the Regional Director stated, it is not clear from this example (which involved a tactical training exercise) whether the lieutenant at issue was disciplined due to inadequate performance by his subordinates, or due to his own deficient performance. The disciplinary form largely focuses on the lieutenant's failure to notify a shift operations manager that a training exercise he was conducting would use a security door. The form also faults the lieutenant for failing to ensure the door was resealed, but refers to this as a duty of lieutenants and makes no reference to the lieutenant's subordinates or a failure to properly direct them. Even though a captain testified that this discipline was based on the inadequate performance of the lieutenant's subordinates, this testimony consisted of a

<sup>2</sup> Cf. *Republican Co.*, 361 NLRB No. 15, slip op. at 8 (2014) (sporadic exercise of supervisory authority does not confer supervisory status (citing *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002))).

single conclusory statement; the remainder of the captain's testimony focused on the lieutenant's failure to notify the shift operations manager that the exercise was going to use the security door.<sup>3</sup>

We also note, in agreement with the Regional Director, that the Employer has not established that lieutenants use independent judgment in directing employees in tactical and non-tactical situations. For non-tactical direction, such as conducting daily muster, determining if employees are fit for duty, performing post checks, and responding to routine incidents, the record establishes that the Employer has detailed security orders, post orders, standard procedures, and other directives and regulations that govern non-tactical direction. Similarly, for tactical direction, various witnesses testified that each area and post had very detailed response plans and standard procedures governing responses to real or simulated incidents and emergencies. Although there was testimony about some variables a lieutenant might consider in giving direction, it is vague and lacks even general examples of choices lieutenants make in tactical situations.<sup>4</sup>

As in *Buchanan Marine*, 363 NLRB No. 58 (2015), the dissent proposes a new test for supervisory status based on the "practical realities of running a business," specifically, (1) the nature of the employer's operations; (2) the work performed by undisputed statutory employees; and (3) whether it is plausible to conclude that all

supervisory authority is vested in persons other than the putative supervisors. Applying this proposed standard to the instant case, the dissent contends that because a nuclear power plant is involved and "the work involves thwarting or repelling a terrorist attack or other force-based incursion by armed attackers," it "strains credulity" to suggest that the lieutenants do not responsibly direct the security personnel. The dissent further asserts that it is implausible to suggest in this case that all authority to responsibly direct the protective force "is exercised exclusively by 10 statutory supervisors."

Contrary to the dissent, however, the question before us is not whether the nuclear power plant is without sufficient personnel whose commands must be obeyed in the event of an attack. Obviously, such persons include the Employer's statutory supervisors (four majors, one Law Enforcement chief, and five captains), as well as its lieutenants, whether or not they are supervisors. But, as the Board explained in *Buchanan Marine*, 363 NLRB No. 58, slip op. at 2, that does not answer the question posed by the Act. The sole question the Board must answer when making a supervisory determination is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11). Thus, we rely upon the statute—specifically, the 12 enumerated types of 2(11) authority—and not other considerations the dissent propounds, such as whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. As the Third Circuit has observed, "[t]o do otherwise would be to usurp Congress's authority to promulgate the law." *NLRB v. Attleboro Associates*, 176 F.3d 154, 163 fn. 5 (3d Cir. 1999). See *Buchanan Marine*, 363 NLRB No. 58, slip op. at 2.

The dissent relies heavily on an assumption that if the Board were to find that the lieutenants are not statutory supervisors, the security personnel would somehow be left without direction in the event of a terrorist attack. But our finding that the Employer's lieutenants are not supervisors for purposes of the Act—because they are not held accountable for the deficient performance of subordinate employees—does not mean that the lieutenants' commands need not be obeyed, that the nuclear power plant would be inadequately protected in the event of an attack, or that national security would be at risk. Lieutenants would still be able to direct the security officers, whether or not they are considered supervisors under the Act. Our decision today simply permits the

<sup>3</sup> Therefore, contrary to the dissent the record does *not* demonstrate that lieutenants are held accountable if the employees in their units fail to carry out their responsibilities. As noted above, in the *only* example in the record, and both the form and the witness's testimony indicate that the lieutenant was disciplined for his own errors and failures, not those of his subordinates. Similarly, we do not find "on-the-spot" corrections given by the lieutenants when they observe a subordinate improperly performing a given task to constitute responsible direction as there is no evidence in the record that the lieutenants are held accountable for the deficiencies in the subordinates' performance of these routine tasks. See *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2155; *Lynwood Manor*, 350 NLRB at 490–491.

<sup>4</sup> The dissent cites as an example of the lieutenants' use of independent judgment the testimony of one lieutenant that he determined, "based on his assessment of the variables at play," that it was appropriate to deviate from a normal response regarding a mailroom inspection. This incident involved a lieutenant's decision not to evacuate the building after a dog responded to a package in the mailroom, but instead to call in a second dog team. Contrary to the dissent, the lieutenant did not independently make this determination. Rather the lieutenant testified, "I made the determination [not to evacuate the building] *after* talking to the chief [a statutory supervisor]." (Tr. 352 (emphasis added).) Additionally, the lieutenant's decision not to evacuate the building did not involve direction of other employees. Although the lieutenant's decision to call in a second dog team involved direction, the lieutenant did not elaborate on why he called in the team that he did or if he had to choose between teams. Thus, it is unclear whether this example involved more than one obvious choice. See *Oakwood Healthcare*, 348 NLRB at 693 (independent judgment is not implicated "[i]f there is only one obvious and self-evident choice").

lieutenants to vote whether to be represented for the purposes of collective bargaining.<sup>5</sup>

#### Assignment

With respect to the lieutenants' purported authority to assign, we find that the Employer did not establish that the lieutenants possess this authority. First, there is no evidence that approving or adjusting post rotation schedules involves more than routine judgment. Second, in temporarily reassigning employees to areas where they are not normally assigned, there is no evidence concerning which factors lieutenants consider apart from whether the employees have the skill and knowledge to staff a particular post. Such assessments do not require the use of independent judgment sufficient to support a supervisory finding. *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004) (assigning work to employees on the basis of known job skills does not require use of independent judgment). Third, permanent reassignments do not require independent judgment as they are based on seniority. Fourth, assuming lieutenants have the authority to require overtime, they do not exercise independent judgment in doing so because their judgment is controlled by a detailed procedure set forth in the Employer's collective-bargaining agreement with its Special Police Officers (SPOs) and Security Officers. Fifth, the authority to grant time off is a secondary indicium only, and the record does not establish that any such authority is exercised with the use of independent judgment. See *Modesto Radiology Imaging, Inc.*, 361 NLRB No. 84, slip op. at 3, fn. 4 (2014).<sup>6</sup> Finally, the record fails to establish that the lieutenants' role in arranging unscheduled training exercises involves the exercise of independent

judgment. There is no evidence as to what factors lieutenants consider when arranging these exercises.<sup>7</sup> Further, some of this unscheduled training, such as awareness exercises for SPOs,<sup>8</sup> pertains to discrete tasks that are part of the SPO's regular duties, not significant overall duties. See *Oakwood Healthcare, Inc.*, 348 NLRB at 689 (assignment of an employee to a certain department, a certain shift or to certain significant overall tasks "would generally qualify as 'assign' within our construction.").

#### Discipline

We agree with the Regional Director's finding, for the reasons he stated, that the Employer has not established that lieutenants possess the authority to discipline, or that they effectively recommend discipline.<sup>9</sup> We further observe that the record before us does not establish that the Employer consistently applies a progressive disciplinary policy. The policy, along with the Employer's work rules, states that the Employer reserves the right to deviate from progressive discipline based on the severity of the violation, and there are no examples of the Employer relying on prior discipline to impose a higher level of progressive discipline. The sole disciplinary notice in evidence that refers to prior discipline is wholly inconsistent with progressive policy as written. That notice refers to the disciplined employee having received a written warning and a written reprimand within the prior 12 months, yet the employee received only a written warning, rather than a suspension that would have issued had progressive discipline been imposed. Cf. *DirecTV*, 357 NLRB 1747, 1749 (2011) (authority to discipline not established where "[e]mployer did not introduce evidence establishing the existence of a progressive disciplinary system or otherwise explain how the verbal or written warnings contained in [disciplinary notices] in the record were linked to future disciplinary action").

<sup>5</sup> It is worth emphasizing that we share our dissenting colleague's appreciation for the vital work of the Employer's security personnel in protecting the Savannah River Site nuclear power plant and nuclear materials. Respectfully, however, we regard his discussion of the emergency scenarios as melodramatic. We utterly reject any suggestion that the lieutenants' decision (if they so choose) to exercise their right to union representation would undermine their ability or their desire to perform their duties. Equally far-fetched is the suggestion that the sergeants and security officers would be any less likely, in the event of an emergency, to obey the lieutenants' commands owing to the lieutenants' possession or exercise of Sec. 7 rights. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.").

<sup>6</sup> The cases the Employer relies on with respect to the authority to assign are also distinguishable, as the Regional Director stated. *Burns International Security Services, Inc.*, 278 NLRB 565 (1986), involved a supervisory finding that rested on plant guards' authority to evaluate and discipline, not their authority to assign. And *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001), involved aspects of the authority to assign not present here, such as the authority to override predetermined assignments.

<sup>7</sup> One lieutenant gave vague testimony regarding his decision to grant a request to use the site's helicopter in a training exercise. The lieutenant's testimony suggests that his decision was based on routine factors, such as the helicopter's flight schedule and maintenance requirements. Therefore, any judgment on this count is also routine.

<sup>8</sup> For awareness exercises, lieutenants place a tag or marker on a gate for the SPOs patrolling the area to spot and report.

<sup>9</sup> In addition to the reasons stated by the Regional Director, we find that lieutenants do not effectively recommend discipline because the labor relations department reviews all discipline prior to issuance. See *Franklin Home Health Agency*, 337 NLRB at 830 ("To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel."); see also *GAS Regulated Security Solutions*, 362 NLRB No. 134, slip op. at 3 (instruction to get a captain's review before issuing discipline supported a finding that the lieutenants did not have the authority to exercise independent judgment in issuing discipline).

Given these considerations, the Employer's reliance on *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), is misplaced.

In sum, we agree with the Regional Director that the Employer has not met its burden to establish that its lieutenants possess any of the indicia set forth in Section 2(11). Accordingly, we find, in agreement with the Regional Director, that they are not supervisors within the meaning of the Act.

#### ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C., February 10, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

This case has several ingredients but presents a single issue. The ingredients are a nuclear power plant, potential terrorist raids and other force-based incursions, and lieutenants who command teams of security officers responding to those raids and incursions. The issue is whether these lieutenants are supervisors. Contrary to my colleagues and the Regional Director, I think the answer is yes, these lieutenants are clearly supervisors within the meaning of Section 2(11) of the Act based on their authority to responsibly direct the Employer's security personnel.<sup>1</sup>

As stated, the lieutenants command teams of security officers in responding to and repelling force-based incursions into the Savannah River Site nuclear power plant and during training exercises to prepare for such incidents. Their direction of the security officers under their command determines whether the tactical response succeeds or fails and thus serves a critical national security function. I believe that it defies reason to conclude, as do my colleagues, that the lieutenants' authority to direct security officers in carrying out these tactical responses is not responsible direction within the meaning of Section 2(11) of the Act.

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<sup>1</sup> I find it unnecessary to pass on whether the lieutenants are Sec. 2(11) supervisors based on their authority to assign or discipline.

#### DISCUSSION

The Employer is responsible for maintaining the physical security of the Savannah River Site nuclear power plant and structure at all times, including nuclear materials that are transported by truck convoys. This secure site covers an area of 310 square miles. The Employer's security responsibilities include what the Regional Director described as the "tactical responsibility to respond and repel a forced or force-based incursion into the plant by armed individuals."<sup>2</sup>

It is worth pausing to consider what we are talking about here. "Armed individuals" means some unknown number of terrorists or other attackers equipped with lethal weapons. "Forced or force-based incursion" means the terrorists or other attackers are using these weapons to destroy or take possession of the nuclear power plant, or to obtain nuclear materials that are in process of being transported.

To defend against such armed attacks, the Employer employs a "protective force" that consists of deployed teams of security police officers and sergeants, commanded by a lieutenant. The protective force has a "military model chain of command."<sup>3</sup> The chain of command above the lieutenants is sparse. There are four rotating shifts, and each rotating shift is headed by a single major. Law Enforcement is headed by a "chief," who is equivalent to a major. Thus, the protective force is headed by *five individuals*. Below them are five captains, each dedicated to one of five protective force functions or areas<sup>4</sup> across all four shifts. Consequently, during any single rotating shift, the entire chain of command consists of *three or four individuals*: one major, possibly the Law Enforcement chief, and one or two captains (since each of the five captains has responsibilities across all four rotating shifts). Under them (across all shifts and functions or areas), there are 46 lieutenants; and under the lieutenants, there are approximately 330 lower-level protective force personnel, consisting of 30 sergeants and roughly 300 security police officers (SPOs), security officers (SOs), and central alarm station operators (CAS).

To prepare for forced or force-based incursions, lieutenants regularly direct teams under their command in training exercises practicing responses to various simulated attack scenarios. Lieutenants also command the truck convoy whenever nuclear material is transported

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<sup>2</sup> Regional Director's Decision and Direction of Election ("D&DE") at 3.

<sup>3</sup> *Id.*

<sup>4</sup> The five designated functions or areas—each assigned to a different captain—are H area, K area, PPD (Perimeter Protection Department), SRT (Special Response Team), and LE (Law Enforcement).

within the site. I believe that the command authority exercised by lieutenants in tactical situations and during training exercises sufficiently demonstrates responsible direction. While the Employer maintains classified response plans for various scenarios, those plans cannot and do not cover all of the contingencies or situations that could arise. Even when a plan covers a scenario, it does not dictate every decision a lieutenant must make. Instead, lieutenants must decide on their own how to maneuver the force under their command, which tactics to apply, and whether to order their team to open fire. This demonstrates that the lieutenants exercise independent judgment in directing their subordinates. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006) (“[T]he mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”).

My colleagues acknowledge that “there was testimony about some variables a lieutenant might consider” in tactical responses, but they find that the lieutenants do not use independent judgment in such situations because the testimony “is vague” and there are “very detailed response plans” and “standard procedures” in place. In my view, this finding fails to recognize the unpredictable nature of events that could unfold during an attack on a nuclear site. Moreover, even though the Employer has such plans and procedures, the record establishes that lieutenants exercise independent judgment based on how they are expected to handle contingencies. To take one example, a lieutenant testified that he determined, based on his assessment of the variables at play, that it was appropriate to deviate from a normal response regarding a mailroom inspection to reach the result that was appropriate in the circumstances. Specifically, the lieutenant testified that, while he was training a new dog handler by having the handler observe an on-duty dog and handler team, the on-duty dog responded to a package. After analyzing the circumstances of the on-duty dog’s response to the package, the lieutenant determined that, rather than evacuate the building—which would have been the normal response—it was appropriate, instead, to deviate from the normal response by calling in a second dog team to perform an additional search.<sup>5</sup>

<sup>5</sup> My colleagues concede that the lieutenant’s decision to call in a second dog team involved direction. However, they contend that the lieutenant did not “independently make the determination” to bring in a second dog team instead of evacuating the building because he testified that he “made the determination [not to evacuate the building] after talking to the chief [a statutory supervisor].” I respectfully disagree with my colleagues’ view that this testimony shows that the lieutenant did not exercise independent judgment. To the contrary, relevant testimony establishes that the lieutenant “made the determination to handle” the situation “the way we did” and decided to bring in a second

As for accountability, the record contains testimony that lieutenants are subject to verbal correction or written discipline from higher-ranking officers if the employees in their units fail to carry out their responsibilities. Lieutenants are responsible for training their subordinates, and they may be disciplined if the training is deficient. In one instance, the Employer suspended and demoted a lieutenant for failing to perform assigned duties relating to a training exercise. The captain who issued the discipline testified that the discipline was based on the inadequate performance of the lieutenant’s subordinates. In my view, the evidence establishes that lieutenants are accountable for the performance of their subordinates and thus responsibly direct them. See *Oakwood Healthcare*, 348 NLRB at 691–692; *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 2 (2014) (Member Miscimarra, dissenting in part). My colleagues reject this evidence as “conclusory” because only a single example was provided. To the contrary, the evidence was sufficient, and I believe it does violence to the preponderance of the evidence standard to disregard relevant evidence merely because the majority believes the Employer should have introduced yet more evidence. *G4S Regulated Security Solutions*, 362 NLRB No. 134, slip

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dog team to perform a search, “[in] the meantime notifying our management . . . .”

I also disagree with my colleagues’ position that the lieutenant did not exercise independent judgment under *Oakwood Healthcare*, supra, because “it is unclear whether this example involved more than one obvious choice.” As to this point, my colleagues state that, even though the lieutenant’s decision to call in a second dog team involved direction, the lieutenant did not exercise independent judgment because he “did not elaborate on why he called in the team that he did or if he had to choose between teams.” Contrary to my colleagues, the lieutenant described, in detail, how he assessed the variables involved in determining how to proceed—including why he called in a second dog team—thus establishing that the matter did not involve an “obvious” reaction. Specifically, the lieutenant testified that the purpose of calling in a second dog team was to perform an additional search of the package, based on the information and resources that were available at the time. The lieutenant further testified that the second dog was needed because the second dog could determine whether the first dog was, in fact, responding to “residual,” and the second dog was necessary because the first dog “is threshold order, meaning he could detect really small quantities.” Finally, with all due respect to my colleagues, I do not believe that an alleged lack of elaboration regarding a “cho[ice] between [dog] teams” is relevant to the analysis here. Simply put, the example found in the section of *Oakwood Healthcare* quoted by my colleagues in support of their contention relates to questions involving independent judgment involving the assignment of charge nurses to particular patients—not to a discretionary decision to bring in a second dog team to determine whether, based on an initial dog’s reaction, explosives are actually present in a mailroom at a nuclear facility. In any event, as explained above, the lieutenant testified about why he decided to bring in a second dog team. In sum, the lieutenant’s decision to bring in a second dog team for the purpose of conducting an additional search and not evacuate the building—which deviated from the normal response—involved independent judgment.

op. at 6 (2015) (Member Miscimarra, dissenting). Moreover, this evidence was reinforced by other corroborative testimony indicating that lieutenants are subject to discipline for failing to satisfactorily train subordinate employees.

This case illustrates a troublesome aspect of many Board findings regarding supervisory status. Congress intended that an individual would be deemed a supervisor if he or she possesses *just one* of the 12 different types of supervisory authority listed in Section 2(11). And even if a person lacks authority in *any* of these 12 categories, he or she is still a supervisor if the person can “effectively . . . recommend” action in one of the 12 areas. However, perhaps because a finding of supervisor status effectively denies representation to the individuals in question, the Board has tended to evaluate each Section 2(11) factor in isolation, and then construe each factor so narrowly as to compel a conclusion that *nobody* is a supervisor. In this respect, as I indicated in *Buchanan Marine, L.P.*,<sup>6</sup> the Board’s treatment of supervisor status has become “increasingly abstract and out of touch with the practical realities” of many work settings—indeed, here as in *Buchanan Marine*, my colleagues paradoxically find that individuals with command authority do not have supervisory authority—and the Board has failed to recognize that many businesses “cannot function, as a practical matter, without having someone—or some reasonable number of people—exercising supervisory authority at a particular facility, during a particular shift, or in relation to a particular function.”<sup>7</sup>

Accordingly, I have outlined three “common sense” factors that, in my view, the Board must consider in every case when evaluating supervisor status under Section 2(11): (i) the nature of the employer’s operations, (ii) the work performed by undisputed statutory employees (i.e., the employees who require supervision by someone), and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.<sup>8</sup> In plain English, as I indicated in *Buchanan Marine*, the final factor essentially asks, “If one accepts the Board’s finding that the disputed employees are *not* supervisors, does that produce a ludicrous or illogical result—for example, one where *nobody* has the authority to hire, discharge, discipline,

assign, or responsibly direct employees (or to exercise any of the other indicia of supervisory authority set forth in Section 2(11))?”<sup>9</sup>

In the instant case, there is no dispute regarding the first factor, the “nature of the employer’s operations.” Here, the work involves thwarting or repelling a terrorist attack or other force-based incursion by an unknown number of armed attackers seeking to destroy or take possession of a nuclear power plant or nuclear materials being transported by convoy.

Nor is there any dispute about the second factor, “the work performed by undisputed statutory employees.” The undisputed statutory employees are the 30 sergeants and approximately 300 security personnel, and the work they perform is to train for and, if and when necessary, repel armed attackers using force to destroy or take possession of the nuclear power plant or nuclear materials.

Finally, as to the third factor, if we assume that the lieutenants are *not* supervisors, is it plausible to conclude that all responsible direction of roughly 330 individuals during a terrorist attack on a nuclear power plant is vested in four majors (each of whom is assigned to only one shift), one Law Enforcement chief, and five captains (each responsible for only one area or function)? For several reasons, I believe such a conclusion would be contrary to the record and “fail the test of common sense.”<sup>10</sup>

First, given the nature of the Employer’s operations and the enormous uncertainty associated with any potential “force-based incursion” by those who seek to destroy or commandeer a nuclear power plant or nuclear materials, it strains credulity to suggest that the 46 lieutenants, who undisputedly command the lower-level security personnel, fail to responsibly direct them and thus exercise supervisory authority. Indeed, the Regional Director’s Decision and Direction of Election is replete with findings that lieutenants exercise direct and immediate control over those underneath them, especially during efforts to repel “force-on-force” attacks.<sup>11</sup>

<sup>9</sup> Id. (emphasis in original).

<sup>10</sup> Id.

<sup>11</sup> The Regional Director found that an SRT lieutenant “is the response force leader during any incident involving a[n] SRT team or teams and thus directs the movements of all deployed personnel and equipment,” and that “SRT teams are redirected to other area locations by the sergeant or lieutenant as the tactical situation dictates” (D&DE at 8). “Each shift lieutenant is responsible for preparing and commanding a set number of shift exercises per month and annually,” and “[t]he shift lieutenant in command of the exercise is the incident commander” (id. at 9). During a “force-on-force” training exercise, which usually involves the “entire shift” for a particular area, the “area lieutenant is designated the response team leader and directs the response to the incident” (id.). During a simulated attack during the movement of nuclear materials, an “SRT lieutenant is commander of the convoy, its

<sup>6</sup> 363 NLRB No. 58, slip op. at 3–10 (2015) (Member Miscimarra, dissenting).

<sup>7</sup> Id., slip op. at 4–5 (Member Miscimarra, dissenting).

<sup>8</sup> As I explained in *Buchanan Marine*, supra, slip op. at 10, I believe the Board cannot conduct any realistic appraisal of the Section 2(11) indicia without considering the three factors referenced in the text. I refer to these as “common sense” factors because they “are meant to help the Board avoid conclusions regarding supervisory status that fail the test of common sense.” Id.

Second, I am not persuaded by my colleagues' suggestion that lieutenants fail to exercise independent judgment in responsibly directing subordinates because (as characterized by the majority) there are "detailed security orders, post orders, [and] standard procedures," and "various witnesses testified that each area and post had very detailed response plans and standard procedures governing responses to real or simulated incidents and emergencies." Considering the magnitude of the threat and the dire consequences that could result from lack of preparedness, one would expect the Employer to have a plethora of security plans for a host of contingencies. However, no amount of planning can anticipate everything. Given the enormous uncertainty regarding types of threats that might materialize, the mere existence of contingency plans does not detract from the obvious role played by lieutenants who direct lower-level employees on every shift and with respect to every area or function. Indeed, the requirement that lieutenants adhere to an array of detailed contingency plans while simultaneously confronting actual threats as they emerge in real time makes their role more rather than less important in directing sergeants and other lower-level security personnel.

Third, I believe the record and the Regional Director's findings—combined with the size and complexity of the Savannah River Site nuclear facility—make it implausible to suggest that all authority to responsibly direct 330 lower-level protective force personnel is exercised exclusively by 10 statutory supervisors: five captains (each responsible for a single protective function or area), four majors (each assigned to a single rotating shift), and one Law Enforcement chief. In my view, it is not reasonable to conclude that the Employer's extensive security operations contemplate that "detailed response plans" and "standard procedures" will thwart unknown numbers of armed attackers who seek to destroy or take possession

movement, and the security of the movement to insure protection of the materials" (id. at 10). "Lieutenants have sergeants who, in turn, report to them" (id. at 4). At the beginning of each protective force area shift, there is a formal "muster," during which "the shift lieutenants relay pertinent information" to sergeants and other security officers, including "safety matters and alphanumeric codes for identification between friend and foe" (id.). On each shift, during the issuance of weapons and ammunition, the lieutenants "observe the loading of ammunition of the incoming shift and the unloading of ammunition from the outgoing shift" (id. at 5). The "SRT SPOs in H area and K area report to SRT sergeants who, in turn, report to SRT lieutenants" (id. at 6). The security personnel include canine teams, including nine explosives teams and one narcotics team; the "canine shift lieutenants are assigned to work on one of the four twelve-hour shifts insuring that a canine team is always on site," and "[s]hould a team handler have questions or an unusual situation arise, then the shift lieutenant is contacted" (id. at 7–8).

of the nuclear power plant or nuclear materials, without having responsible direction provided by a reasonable number of supervisory personnel on each rotating shift and in every area or function. Nor does the record reasonably support a finding that all responsible direction is provided by the five captains, four majors and the Law Enforcement chief. In this particular work setting, and consistent with the "military model chain of command,"<sup>12</sup> responsible direction necessarily must also be provided by the lieutenants.<sup>13</sup> Moreover, I believe the record compels a conclusion that the lieutenants *do* provide such responsible direction, which warrants a finding that they are statutory supervisors.

### CONCLUSION

For the reasons set forth above, I would find that the lieutenants are Section 2(11) supervisors because, at a minimum, they possess authority to responsibly direct sergeants and other subordinate security officers and exercise independent judgment in doing so. Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 10, 2016

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Philip A. Miscimarra,

Member

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<sup>12</sup> D&DE at 3.

<sup>13</sup> My colleagues acknowledge that the Employer's security personnel perform "vital work . . . in protecting the Savannah River Site nuclear power plant and nuclear materials[.]" but they dismiss my "discussion of the emergency scenarios" that may occur at the Site as "melodramatic." With respect, I do not believe it is "melodramatic" to consider that attacks on the Site could take a variety of forms, and that lieutenants would be required to exercise independent judgment in unpredictable and life-threatening circumstances. My colleagues also state that they "reject any suggestion that the lieutenants' decision (if they so choose)" to unionize "would undermine their ability or their desire to perform their duties[.]" and that it is "far-fetched" to suggest that sergeants and security officers "would be any less likely, in the event of an emergency, to obey the lieutenants' commands" as a result of today's decision. If by these statements my colleagues mean to imply that I hold such views, I do not, nor do I believe that such views may reasonably be inferred from this dissent. I have no doubt that lieutenants would, of course, fulfill their duties in any event. I simply believe my colleagues' determination that the lieutenants lack authority to responsibly direct subordinates under their command fails the test of common sense.